U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-A-L- LLC

DATE: JUNE 20, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an importer and distributor of ethnic foods, sought to permanently employ the Beneficiary as a business operations research analyst. It requested classification of the Beneficiary as a member of the professions holding an advanced degree under the second-preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on March 10, 2015. The Director concluded that the record did not establish the Beneficiary's qualifications for the offered position or the requested classification. The Director also found that the record did not establish the *bona fides* of the job opportunity.

The matter is now before us on appeal. The Petitioner argues that the Director did not consider evidence of the Beneficiary's qualifications and the *bona fides* of the job opportunity. Upon *de novo* review, we will dismiss the appeal.

I. MOOTNESS OF THE APPEAL

We may dismiss an appeal as moot if it lacks practical significance. *See Matter of Luis*, 22 I&N Dec. 747, 753 (BIA 1999) (finding that an administrative tribunal may dismiss an appeal or deny a motion "as a matter of prudence").

The instant record indicates the Beneficiary's death 9 days before the Director issued his decision. Because the Petitioner can no longer employ the Beneficiary in the offered position, the appeal appears to lack practical significance.

But the Petitioner continues to seek the petition's approval so the Beneficiary's spouse and children may apply for lawful permanent resident status as surviving derivative beneficiaries of the Beneficiary under section 204(l) of the Act, 8 U.S.C. § 1154(l). Under that provision, a beneficiary's death does not require denial of an employment-based, immigrant visa petition. Rather, U.S. Citizenship and Immigration Services (USCIS) may grant a petition if it otherwise was and remains approvable. *See* USCIS Policy Memorandum PM-602-0017, *Approval of Petitions and*

Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act 6 (Dec. 16, 2010), https:www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf (accessed Mar. 18, 2016).

Therefore, despite the Beneficiary's death, we decline to dismiss the appeal as moot because its adjudication will affect the eligibility of her derivative beneficiaries to apply for lawful permanent residence under section 204(l) of the Act.

II. THE BENEFICIARY'S QUALIFICATIONS

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Also, a petition for an advanced degree professional must be accompanied by documentation showing that a beneficiary is a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(3). The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree," or "[a] United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty." 8 C.F.R. § 204.5(k)(2).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is June 5, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The accompanying labor certification states the minimum requirements of the offered position of business operations research analyst as a Bachelor's degree or a foreign equivalent degree in statistics, economics, logistics, or a related field. The labor certification also states that the position requires at least 60 months, or 5 years, of experience as an analyst, financial consultant, accountant, or a related occupation.

A. The Beneficiary's Educational Qualifications

The Beneficiary attested on the accompanying labor certification to her receipt of a Bachelor's degree in economics from [redacted] Turkey, in 1986. The record contains copies of a

certificate of graduation, an undergraduate diploma (*lisans diplomasi*), and a transcript, indicating the Beneficiary's studies at [redacted] from September 22, 1982 to December 1, 1986. The record also contains two evaluations of the Beneficiary's foreign educational credentials, both concluding that she possesses the equivalent of a U.S. bachelor of arts degree in economics.

The Director noted that U.S. baccalaureate degrees generally require 4 years of university study. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). The Director found that the record did not establish the Beneficiary's possession of a four-year degree.

But the Beneficiary's transcript indicates her completion of 4 years of study. Also, the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) states that a Turkish *lisans diplomasi* is awarded after completion of a 4-year program of university study and is comparable to a U.S. bachelor's degree. Federal courts have found EDGE to be a reliable, peer-reviewed source of information about foreign educational equivalencies. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (holding that USCIS has discretion to discount letters and evaluations submitted by a petitioner if they differ from reports in EDGE, which is "a respected source of information").

The record establishes the Beneficiary's possession of the foreign equivalent of a U.S. bachelor's degree in economics by the petition's priority date. The record therefore establishes the Beneficiary's educational qualifications for the offered position as stated on the accompanying labor certification. We will therefore withdraw the Director's contrary finding.

B. The Beneficiary's Qualifying Experience

As previously indicated, an advanced degree professional must possess at least a U.S. bachelor's degree or a foreign equivalent degree followed by 5 years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). As discussed above, the record establishes the Beneficiary's possession of the foreign equivalent of a U.S. bachelor's degree.

A petitioner must support a beneficiary's claimed qualifying experience with letters from current or former employers. 8 C.F.R. §§ 204.5(g)(1). The letters must provide the employer's name, address, and title, and describe the beneficiary's experience. *Id.*

In the instant case, the Petitioner submitted two letters on the stationery of [redacted] in Turkey. Both letters state the Beneficiary's employment by the company from February 1, 1987 to December 1, 1997, first as an analyst and, from January 1990 onward, as a financial consultant/accountant. Both letters describe the Beneficiary's experience, which reflects progression from entry-level job duties to advanced responsibilities.

The letters from [redacted] are consistent with experience to which the Beneficiary attested on the accompanying labor certification. But, as the Director noted, the Beneficiary's purported dates of employment at [redacted] conflict with other evidence of record. On a Form G-325A, Biographic

Information, submitted to USCIS with an application for adjustment of status, the Beneficiary stated that she was "unemployed" from January 1995 to May 30, 2006, the date she signed the G-325A. The Beneficiary could not have worked for [redacted] from February 1987 to December 1997 if she was unemployed from January 1995 to May 2006. *See Matter of Ho*, 19 I&N Dec. 582, 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence that point to where the truth lies).

Counsel stated that he "can only surmise that the discrepancy in the dates was a typographical error by the [Beneficiary's] former attorney," who prepared the Form G-325A. But counsel's assertion does not constitute probative evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) (holding that the assertions of counsel do not constitute evidence); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (same). The record lacks evidence - for example, from the former attorney who purportedly prepared the Form G-325A or the Beneficiary – to support counsel's assertion of a typographical error, or to explain why the Beneficiary signed the form under penalty of perjury if it contained incorrect information.

The Petitioner argues that, because the Beneficiary began work for [redacted] in 1987, she gained at least 5 years of qualifying experience whether she stopped working in 1995, as indicated on the Form G-325A, or in 1997, as indicated elsewhere in the record. But the discrepancy in the Beneficiary's dates of employment casts doubt on the veracity of the information in [redacted] letters and the Beneficiary's claimed qualifying experience on the labor certification. The Petitioner must resolve material inconsistencies of record by competent, objective evidence. Unresolved, material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence in support of the petition. *See Ho*, 19 I&N Dec. at 591.

The Petitioner has not resolved the discrepancy in the Beneficiary's claimed dates of qualifying experience by independent, objective evidence. The record therefore does not establish the Beneficiary's qualifications for the offered position and the requested classification. We will therefore affirm the Director's finding and dismiss the appeal.

III. THE BONA FIDES OF THE JOB OPPORTUNITY

By signing an ETA Form 9089, an employer attests, among other things, that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) *(en banc)* (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

USCIS must deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the accompanying labor certification was invalid for the area of intended employment).

> A familial relationship between the alien and the employer does not establish the lack of a *bona fide* job opportunity *per se*. Ultimately, the question of whether a *bona fide* job opportunity exists in situations where the alien has a familial relationship with the employer depends on 'whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening.' *[citing Matter of Modular Container Sys., supra, at *7].* Therefore, the employer must disclose such relationships, and the [adjudicator] must be able to determine that there has been no undue influence and control and that these job opportunities are available to U.S. workers. When the employer discloses a family relationship, and the application raises no additional denial issues, the employer will be given an opportunity to establish, to the [adjudicator's] satisfaction, that the job opportunity is legitimate and, in the context of the application, does not pose a bar to certification. The [adjudicator] will consider the employer's information and the totality of the circumstances supporting the application in making this determination.

U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," at http://www.foreignlaborcert.doleeta.gov/faqsanswers.cfm (accessed Mar. 17, 2016).

In determining whether a *bona fide* job opportunity exists, adjudicators must consider multiple factors, including but not limited to, whether a beneficiary: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in the company's management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Id.* at *8. Adjudicators must also consider whether a beneficiary's pervasive presence and personal attributes would likely cause the petitioner to cease operations in the beneficiary's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

On the accompanying labor certification in the instant case, the Petitioner denied the existence of a familial relationship between the Beneficiary and its owners or corporate officers. But the Petitioner now concedes that its president is the Beneficiary's brother.

The record also indicates that the Beneficiary's brother and spouse are the only two shareholders of a corporation that has a 50 percent ownership interest in the Petitioner, which is a limited liability company. Thus, together, the Beneficiary's brother and spouse indirectly own 50 percent of the Petitioner. *See Modular Container*, 1991 WL 223955 at *5 (indicating that both direct and indirect ownership of a labor certification employer raise concerns about the *bona fides* of a job opportunity).

Some of the *Modular Container* factors indicate that the offered position may have been available to U.S. workers. The record does not indicate that the Beneficiary founded the Petitioner or had an ownership interest in it. Because the Beneficiary did not begin working for the Petitioner until 2013,

the record also indicates that her absence from the company will not likely cause the Petitioner, which has conducted business since 2003, to cease operations.

But the Petitioner concedes that the Beneficiary's brother and spouse are indirect owners of the company, and that her brother is also its president with authority over its day-to-day management and operations. The record also indicates the Beneficiary's status as one of a small number of employees, as the Petitioner indicated its employment of six people at the time of the petition's filing in March 2014. *See* 20 C.F.R. § 656.17(l)(5) (requiring an employer of 10 or fewer people to document any family relationship between the employees and the foreign national).

Despite the relationships between the Petitioner and the Beneficiary, the Petitioner argues that she was not in a position to control or influence hiring decisions regarding the offered position. In response to the Director's request for evidence (RFE) of June 10, 2014, the Beneficiary's brother and spouse stated in affidavits that she was not hired until after unsuccessful attempts to recruit a U.S. worker for the offered position and after the labor certification's filing on June 5, 2013. The Beneficiary's brother stated that her hiring was a business decision and that his familial relationship to his sister was "absolutely not a factor."

But USCIS records indicate the Beneficiary's prior employment by the company owned and controlled by her brother and spouse. The records contain copies of IRS Forms W-2, Wage and Tax Statements, indicating the Beneficiary's employment in 2011 and 2012 by the entity jointly owned and operated by the Beneficiary's brother and spouse that owns 50 percent of the Petitioner. On a Form G-325A submitted with her most recent adjustment application, the Beneficiary stated her occupation with as an "operations analyst," a position with a similar title to the offered position of business operations research analyst. But a copy of the joint, federal income tax return of her and her husband for 2011 states that both worked that year for as "store managers."

The record does not establish the Beneficiary's employment by for legitimate business reasons. The Beneficiary's employment history with companies owned by her brother and her husband casts doubt on the Petitioner's claimed motivation for hiring her and the availability of the position to U.S. workers. *See Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

In addition, USCIS records indicate the Beneficiary's unemployment in the United States until after the November 2008 denial of immigrant visa petition on behalf of her husband. While we are sympathetic to the Beneficiary's surviving spouse and children, the timing of the Beneficiary's employment with companies owned by her brother and spouse, after the denial of the immigrant petition on behalf of her spouse, suggests that the Petitioner's job offer to her was an attempt to obtain lawful permanent resident status for her and her family, rather than a business decision as claimed by her brother.

The Petitioner asserts that it recruited for the offered position in good faith and provides copies of its recruitment materials. It asserts that only one U.S. worker, who lacked the required experience, applied for the position. But, while the Petitioner submitted a copy of the resume of the purported sole applicant, it did not submit a copy of its recruitment report to the DOL, which is required to state the total number of U.S. workers hired and rejected by the Petitioner. *See* 20 C.F.R. § 656.17(g). The absence of the recruitment report casts doubt on whether only one U.S. worker applied for the position as the Petitioner claims and whether any other applicants were lawfully rejected.

After careful consideration of the totality of the circumstances, the Petitioner's evidence does not overcome the doubts cast by the Beneficiary's close relationships to principals of the company and the pattern of her employment by companies owned by them. For the foregoing reasons, the record does not establish the clear availability of the offered position to U.S. workers. We will therefore affirm the Director's finding and dismiss the appeal on this additional ground.

IV. INVALIDATION OF THE LABOR CERTIFICATION

A petition for an advanced degree professional be accompanied by a labor certification, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). USCIS may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact must be deliberate and voluntary, made with knowledge of its falsity. *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999) (citations omitted). A misrepresentation is material if the alien is excludable on the true facts or it tended to shut off a line of inquiry relevant to the alien's eligibility that might well have resulted in a proper excludability determination. *Id.* (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975)).

In the instant case, the record establishes a misrepresentation on the accompanying labor certification. As previously indicated, the Petitioner answered "No" to Question C.9 on the accompanying ETA Form 9089, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" Despite its negative response, the Petitioner concedes that its president was the Beneficiary's brother, and that he and the Beneficiary's spouse are indirect owners of the company.

The Petitioner argues that its false response to Question C.9 on the ETA Form 9089 was inadvertent. In his affidavit, the Beneficiary's brother, who signed the ETA Form 9089, stated that he "did not consider the job offer as some nepotistic favor, which is why [he] did not appreciate the necessity to check off" "No" to Question C.9.

But we do not find the explanation to be convincing. Question C.9 required disclosure of familiar relationships between the Beneficiary and her brother as an owner and officer of the Petitioner, and

between the Beneficiary and her spouse as an owner of the company. In light of the multiple, applicable relationships described in Question C.9, we find it unlikely that the Beneficiary's brother on behalf of the Petitioner did not "appreciate the necessity" of disclosing them. Moreover, the Beneficiary's brother signed the labor certification, declaring under penalty of perjury that the information on it was true and correct. The record therefore indicates the Petitioner's knowledge of the falsity on the labor certification.

The Petitioner argues that its submission of its federal tax returns from 2011 through 2013 with the initial petition disclosed its owners. But, while the Petitioner's tax returns disclosed its 50-percent ownership by additional research was required to discover the underlying ownership of by the Beneficiary's brother and spouse. The record indicates that the Petitioner did not disclose the relationships between its principals and the Beneficiary until after the Director raised the issues in the RFE. We therefore reject the Petitioner's argument that its initial petition disclosed the relationships.

The Petitioner also argues that the misrepresentation was immaterial because, despite the relationships between it and the Beneficiary, the job opportunity was clearly available to U.S. workers. But, as discussed above, the record does not indicate the position's clear availability to U.S. workers. The record indicates the Beneficiary's history of employment with companies owned by her brother and spouse. The timing of the job offer, after the denial of an immigrant petition on behalf of her spouse, also suggests that the offer was an attempt to obtain lawful permanent residence for the Beneficiary and her family, rather than a business decision as the Petitioner asserts.

The relationships between the Petitioner and the Beneficiary were material facts. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986) (holding that a shareholder's concealment in labor certification proceedings of his interest in a petitioning corporation constitutes willful misrepresentation of a material fact). Had the DOL known of the relationships, it would likely have scrutinized the labor certification application more closely and may not have approved it. *See, e.g., Matter of Young Seal of Am., Inc.*, 88-INA-121, 1989 WL 250362, *3 (BALCA 1989) (*en banc*) (finding no *bona fide* job opportunity where a foreign national's spouse was an officer and director of the employer).

The record contains substantial evidence of the Petitioner's willful misrepresentation of a material fact on the accompanying labor certification. We will therefore invalidate the accompanying labor certification and dismiss the appeal on this additional ground.

V. CONCLUSION

The record establishes the Beneficiary's educational qualifications for the offered position. We will therefore withdraw the Director's contrary finding. But the record does not establish the Beneficiary's qualifying experience for the offered position or the requested classification, or the *bona fides* of the job opportunity. We will therefore affirm the Director's decision and dismiss the appeal. The record also contains substantial evidence of the Petitioner's willful misrepresentation of

a material fact on the accompanying labor certification. We will therefore also invalidate the labor certification and dismiss the appeal on this additional ground.

The petition will be denied for the above-stated reasons, with each an independent and alternative ground of denial. A petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1391; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner has not met that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The approval of ETA Form 9089, case number [redacted] is invalidated under 20 C.F.R. § 656.30(d), based on the Petitioner's willful misrepresentation of a material fact.

Cite as *Matter of G-A-L- LLC*, ID# 16892 (AAO June 20, 2016)